Department of Justice reviews the antitrust implications of mergers. Market share is the focal point of the Department of Justice's merger analysis.[183] No need exists to duplicate efforts. Therefore, the Commission ought focus on diversity concerns, which are complementary rather than duplicative *vis-a-vis* the review of local television mergers by the Department of Justice.[184]

Second, market size or rank *per se* is irrelevant. No inherently arbitrary line should be drawn which would, for example, permit waivers in markets of certain size or rank, but not in others.[185] Whereas the Commission reasonably might consider the characteristics of the pertinent local market, whether the market is ranked 27th or 33rd is in itself meaningless. Therefore, market size or rank has no logical place in any criteria employed by the Commission to evaluate requests for waiver of the duopoly rule.

C. A Failed Station Test Is Too Restrictive.

No doubt might exist that failed stations should be permitted to regain their viability via common ownership with another station in the same market. However, LSOC submits that such a criterion is overly restrictive. The failure or

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183 *Second Further Notice* at ¶5.

184 *See Second Further Notice* at ¶5, 7; *see also* LSOC Reply at 16-17.

185 This is not to say that the particular market characteristics such as number of stations, newspapers, etc., would be immune from consideration. What LSOC urges the Commission to avoid is a waiver policy which looks to market rank as a criterion.

near failure of a station is no prerequisite to the benefits of common ownership. Those benefits *and the concomitant lack of harm* from such common ownership are well-established in the record.[186] Those benefits flow whether the station in question is financially troubled or financially sound.

Furthermore, requiring that stations hover on the brink of collapse would leave the public with inferior service and place creditors at undue risk. A financially failing station generally will be providing minimal service and often will be behind in payments to creditors. A station should not be required to reach the point of failure or near failure, thereby short-changing the public and creditors, before it may take advantage of the efficiencies of common ownership.

Therefore, whereas waivers should be granted readily in the case of failing stations, they hardly should be limited to failing stations.

IX. Existing LMAs Are Statutorily Grandfathered Permanently and Should Remain Freely Transferable.

Even if the Commission makes no change in the duopoly rule and determines that LMAs should be considered attributable interests, the Commission must grandfather existing LMAs. Furthermore, it should grandfather them permanently, thereby permitting their renewal by the current parties and transfer to other parties in the future. In other words, if a station was subject to an LMA on

186 *See* Section V, *supra*.

November 4, 1996, that station may remain subject to that LMA, even if renewed, modified, or transferred in the future, permanently. If, however, the LMA ultimately were terminated, the grandfathering would cease, and the station no longer might be subject to an LMA unless LMAs otherwise were allowed under the Commission's rules in effect when the LMA terminated.

The Act requires no less. Congress directed the Commission to grandfather LMAs. As the Conference Committee stated:

> Subsection (g) grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commissions rules. The conferees note the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment.[187]

Similarly, the report of the House Committee on Commerce stated:

> Nothing in subsection [g] is to be construed to prohibit the continuation or renewal of any television local marketing agreement in effect on the date of enactment. The Committee wishes to note the positive contributions of television local marketing agreements and to assure that this legislation does not deprive the public of the benefits of existing local marketing agreements that were otherwise in compliance with Commission regulations on the date of enactment of this legislation. The efficiencies gained through these agreements have reaped substantial rewards for both competition and diversity, enabling stations to go on the air which would not otherwise be able to obtain financing, and saving failing stations which would otherwise go dark.[188]

187Conference Report at 164.

188H. Rep. 104-204, 104th Cong. 1st Sess. (1995) at 119-120.

Floor statements in both chambers also confirm the Congressional appreciation of the benefits of LMAs. For example, Senator Ford observed:

> In addition to the duopoly rule, I am also pleased to see that this conference report grandfathers local marketing agreements, or LMA's. Many local broadcasters have stayed competitive by entering into these LMA's with one another. These innovative joint ventures allow separately owned stations to function cooperatively, achieving economies of scale through combined sales and advertising efforts, and shared technical facilities. These local marketing agreements have served their communities in a number of ways: some have increased coverage of local news; others have increased coverage of local sports, particularly college sports; and, many LMA's have provided outlets for innovative local programming and children's programming.
>
> Together, a review of the duopoly rule and the grandfathering of LMA's, these provisions will help ensure that consumers always have access to free local television programming.[189]

Representative Upton similarly pointed out:

> There are many important issues in the bill before us today. Let me just take a moment to take note of an issue of particular concern to the people of southwest Michigan-local marketing agreements, also known as LMA's.
>
> A very successful LMA is in existence between two stations in western Michigan,WOOD-TV in Grand Rapids and WOTV in Battle Creek. In 1991, WOTV has suffered millions of dollars of losses and was forced to terminate their news operation and layoff many employees while they searched for a buyer.
>
> In late 1991, WOTV was able to enter into an LMA and bring the station back to financial stability. They now have a fully staffed news department dedicated to bringing local news to their viewers. Additionally, they are very active in community affairs such as events at Western Michigan University and the Kalamazoo air show.
>
> I am fully in support of efforts to allow for the continuation of LMA's in the future and I'm pleased that these provisions are part of S. 652.[190]

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[189] 142 CONG. REC. S 687, S705 (daily ed. Feb. 1, 1996).

[190] 142 CONG. REC. H1145, H1177 (daily ed. Feb. 1, 1996).

The Stearns-Fields colloquy was no less emphatic about the benefits of LMAs:

> To respond to the challenges of today's media and advertising marketplace under the existing regulatory scheme, many television broadcasters have emulated their colleagues in radio and entered into innovative arrangements called local marketing agreements, or LMA's. An LMA is a type of joint venture that generally involves the sale of a licensee of chunks of air time on its station to another station, in the same or adjacent market, which then supplies the programming to fill that time and sell the advertising to support it.
>
> Such agreements enable separately owned stations to function cooperatively, achieving significant economies of scale via combined sales and advertising efforts, shared technical facilities and increasing stations access to diverse programming. I'm pleased this legislation recognizes the benefits of LMA's and grandfathers them. By grandfathering lma's, we are allowing broadcasters to continue to use a tool that has helped them meet the challenges of today and tomorrow.
>
> My own state, Florida has 5 LMA's which have generated positive synergies. Channel 26 in Naples could not afford a real news department until it entered into an lma with channel 20 in Ft. Meyers. Now it has an outstanding news operation. This particular joint venture shows how lma's can increase the amount of local news programming. There are many other examples of LMA's across the country that evidence the benefits of such arrangements.[191]

Congress, thus, fully appreciated the benefits of LMAs and demonstrated no intent that they be curtailed or limited in the future.

Nothing could frustrate Congressional intent more dramatically than limiting LMA grandfathering to the current term of existing LMAs. No reason has been offered to justify termination of any LMA. Moreover, every reason exists to permit existing LMAs to continue into renewal terms and beyond and if either station is sold during the course of the LMA. First, LMAs have been found beneficial not only to the parties, but also to the public interest. The public benefits ought be

[191] 142 CONG. REC. H1145, H1165 (daily ed. Feb. 1, 1996).

maintained and never ought be curtailed by regulatory fiat. Second, no one has yet to show that LMAs are harmful in any way. Third, the parties have every reasonable expectation that agreements permissible and beneficial today will remain so. Provisions permitting LMAs to be renewed or extended and provisions permitting the assignment of an LMA are far from unusual.[192]

Moreover, in reliance on these provisions, parties have invested millions of dollars in improving the LMAd stations service and performance.[193] These investments were premised on contract provisions permitting renewal and transferability. Even where no such explicit provisions exist, parties should not be denied the ability to extend an LMA or assign the LMA in connection with sale of one of the stations involved. Thus, the Commission must not write portions of contracts out of existence, but should recognize the entire contract (including transferability and renewal provisions) in crafting a suitable grandfather provision under the statute. To rob parties of the ability to gain a full return on their investments is tantamount to a taking without compensation.

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[192]*See* Malrite Comments at 51-52.

[193]*See* Malrite Comments at 51-52 ("LMA arrangement usually involve a substantial expenditure of resources, particularly in the television area, that can only be recouped in a more long-term arrangement among the parties."); *see also* Comments of Brooks Broadcasting LLC, MM Docket No. 91-221 (filed May 18, 1995) at 8. ("LMAs were entered into with the expectation that the parties could continue to participate in the LMAs for as long as both parties agreed to do so. The terms of and opportunity for renewal are an integral part of the LMAs for which the parties thereto bargained....Most parties have made substantial investments in these projects, and reasonably expected that they would continue on beyond just the initial renewal period.").

On the other hand, the abrupt termination of LMAs in the near term would place the parties and the public interest at risk. First, for example, the network affiliation of some LMAd stations is contingent on continuation of the LMA. Second, facing a arbitrary termination of an LMA in the near future, both parties will have incentives to cut their losses. Investments in long term programming improvements would stop. Long term advertising contracts would be impossible. Creating this sort of "lame duck" LMA would sap the vitality from the arrangement and the service offered the public by both stations.

Finally, the Commission might well be creating conditions conducive to the formation of an unending parade of waiver requests, seeking to maintain LMAs beyond their current term or subsequent to a pending station sale. Obviously, this depends on the form of the duopoly rule adopted, but would be a likely occurrence if the Commission proceeded with its proposal to adopt a duopoly waiver policy (rather than modify the rule itself) and limit LMA grandfathering to the current term of the agreement.

Thus, nothing is to be gained, and much is to be lost, if the Commission ignores the Congressional appreciation of the value of LMAs and its intent to preserve them via meaningful grandfathering.

X. LMAs Serve the Public Interest and Should Be Permitted.

LSOC urges the Commission to adopt rules which permit LMAs to be used by station licensees to achieve efficiencies of operation. For example, the Commission might refrain from considering television LMAs attributable interests, thus immunizing them from consideration under the duopoly rule in whatever form it remains in the wake of this proceeding. Alternatively, the Commission might relax the duopoly rule as suggested by LSOC, which would allow for creation of new LMAs in accord with those rules, even if the Commission were to consider LMAs attributable interests. Lastly, in the event the Commission fails to relax the duopoly rule so as to permit common ownership of two stations in the same market, but still considers LMAs attributable interests, LSOC urges the Commission to create an exception to the duopoly rule so as to permit formation of new LMAs.[194]

Such an exception is more than justified on the record before the Commission. Substantial evidence demonstrates that LMAs have been beneficial in terms of the number of operating stations and the service provided by stations involved in LMAs. Congress has well-appreciated these benefits.[195] On the other hand, the Commission has yet to be presented with any probative evidence that LMAs have caused harm or resulted in other public interest costs.

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[194]This also would permit renewal and transfer of grandfathered LMAs in the event the Commission determines to limit grandfathering to the current term and parties of existing LMAs.

[195]*See* Section IX., *supra*.

LMAs also may add jobs to a community. This is particularly true when a failed station is rescued or a new channel placed on the air. However, even in other cases, the efficiencies which may create some job loss often are more than offset by the need to staff new news departments or new local productions. In Cleveland, for example, Malrite of Ohio, Inc., is licensee of WOIO(TV) and provides programming to WUAB(TV), pursuant to an LMA. In 1994, the two stations had 153 employees. Today, they have 252 -- an increase of 99 new jobs.

Finally, LMAs do not operate in void of "unregulation." A substantial body of case law establishes clear ground rules which assure that LMAs inflict no harm on either the public or the Commission's processes[196] No one is suggesting that LMAs be unleashed from these well-established policies and precedents. Indeed, LSOC has proposed additional safeguards to assure that LMAs remain benign.[197]

The Commission, therefore, whatever action it may take in this proceeding, should recognize and embrace the value of LMAs and permit stations to continue to employ them in the future.

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[196]*See* **Reply Comments of Malrite Communications Group, Inc., MM Docket No. 91-221 (filed July 10, 1995) at 7-8.**

[197]*See* **LSOC Reply at 24.**

XI. Conclusion

In view of the above, the Commission must cease any pretensions that the calendar still reads "1964." It is 1997, and the millennium approaches. The 33-year interval has witnessed a revolution in mass media. Markets then served by a limited number of single channel providers -- local broadcast television stations -- now are the home of not only many more local television stations, but also a growing array of multichannel video providers. Furthermore, the vast majority of homes are equipped with VCRs, and even the smallest communities boast video stores with shelves of motion pictures and other programs for home viewing. Many homes now have home computers, which offer access to the Internet and World Wide Web.

In this environment, flush with diversity and thriving with competition, the Commission asks whether common ownership of two local broadcast television stations in the same market poses a threat to diversity or competition. Only one rational answer exists -- NO. The Commission, therefore, must relax the duopoly rule. In particular, as LSOC has urged, the Commission ought:

- Amend the duopoly rule to define a station's market as its DMA and generally abandon use of predicted coverage contours.
- Amend the duopoly rule to consider two stations in the same DMA, but with no Grade A contour overlap, as serving separate markets.
- Amend the duopoly rule to permit common ownership of two television stations in the same market, provided one of the stations is a UHF station.
- Grandfather all LMAs permanently.

- Permit renewal and transfer of all grandfathered LMAs.
- Continue to permit LMAs regardless of changes in its attribution or ownership rules.

Thus, the Commission's rules would resonate with the *video* marketplace of 1997 and beyond, rather the *broadcast* television marketplace of 1964.

The record before the Commission leaves no doubt that nothing is to be lost, while much is to be gained from relaxation of the rules. LSOC, therefore, urges the Commission to set aside its needless fears and reinvent its duopoly rule to fit the exciting and challenging times at hand.

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